IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34978

JOHNNY BARKER,	)	**2009 Unpublished Opinion No. 598**
	)	
Petitioner-Appellant,	)	**Filed: September 1, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

PERRY, Judge

Johnny Barker appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

In 2004, Barker was charged with domestic violence, I.C. §§ 18-903, 18-918(2); second degree kidnapping, I.C. §§ 18-4501, 18-4503; and aggravated battery, I.C. §§ 18-903(b), 18-907(b). The charges arose from two separate instances in which Barker was alleged to have choked his girlfriend, tied her up, and assaulted her. Barker proceeded to trial and a jury found him guilty of all counts.

Barker filed a pro se application for post-conviction relief containing twenty-one separate claims and a request for an attorney. Barker was appointed an attorney, and the state filed an answer, which contained a section asking the district court to summarily dismiss Barker's

application. A scheduling conference was held in June 2007, and summary dismissal hearings were held in July, August, October, and December of that year. Eventually, the district court summarily dismissed Barker's application. Barker appeals.

II.
STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the

applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). In post-conviction actions, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008).

In this case, many of Barker's post-conviction claims are based on ineffective assistance of counsel. A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Knutsen v. State*, 144 Idaho 433, 443, 163 P.3d 222, 232 (Ct. App. 2007). This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

III.

ANALYSIS

A. State's Answer

Barker argues that the state's answer cannot be construed as a motion for summary dismissal and, therefore, the district court summarily dismissed his application for post-conviction relief without complying with the statutory notice requirements. The state contends that Barker had actual notice that it was seeking summary dismissal and the grounds therefore.[1]

Idaho Code Section 19-4906 provides, in pertinent part:

> (b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. . . .
>
> (c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Pursuant to I.C. § 19-4906(b), the district court may sua sponte dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19-4906(c), if the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Martinez v. State*, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995). The reason that subsection (b), but not subsection (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the "motion itself serves as notice that summary dismissal is being sought." *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). The Idaho Supreme Court recently addressed the notice required by I.C. § 19-4906(c) in *DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009). The Court there noted that the notice requirement is met if "the notice is sufficient that the other

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[1] The state also argues that Barker cannot raise this claim for the first time on appeal pursuant to *DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009). However, because we conclude that Barker had notice that the state was seeking summary dismissal, we need not address the procedural bar raised by the state.

party cannot assert surprise or prejudice" and the Idaho Rules of Civil Procedure require only "reasonable particularity." *Id.* at 601, 200 P.3d at 1150.

In April 2007, Barker filed an application for post-conviction relief with twenty-one separate claims. In response, the state filed an answer in May. The state's answer contained a section listing its grounds for summary dismissal of Barker's application. Barker's argument relies primarily on *Workman v. State*, 144 Idaho 518, 524, 164 P.3d 798, 804 (2007), where the Idaho Supreme Court stated that the "preferable practice [under I.C. § 19-4906(c)] is: (1) to file a motion separate from the answer, (2) to identify that motion as a motion for summary disposition, not a motion to dismiss, and (3) to use the language of I.C. § 19-4906(c) and cite that specific statutory provision in support of the motion for summary disposition." Barker argues that summary dismissal was inappropriate in this case because the state did not comply with any of those three recommendations.

We are unpersuaded. The purpose behind the recommendations in *Workman* is to provide the applicant with notice that the state is seeking summary dismissal and the grounds on which summary dismissal is sought. In this case, the district court held a scheduling conference in June to "set a hearing on [the state's] motion for summary judgment." Although Barker was not present at the scheduling conference, his post-conviction attorney was. At the scheduling conference, a hearing was set for July to entertain argument on the state's motion for summary dismissal. At that July hearing, Barker's post-conviction counsel asked for a continuance and the summary dismissal hearing was rescheduled for August. At the summary dismissal hearing held on August 9, Barker withdrew several of his post-conviction claims and the state argued for summary dismissal of the remaining claims. After three hearings in which Barker's post-conviction attorney, the state and the district court all discussed the state's motion for summary dismissal, Barker cannot now complain that he was unaware that the state was seeking summary dismissal of his application. Therefore, although the state should have filed a separate motion for summary dismissal as recommended in *Workman,* Barker's claim fails.

B. Grounds for Summary Dismissal

Barker argues that two of his claims were dismissed on grounds different than those contained in the state's answer and request for summary dismissal. Barker does not challenge the sufficiency of the state's notice concerning these two claims and such an argument would fail because the sufficiency of the notice provided by the state was not argued below. *DeRushé,* 146

Idaho at 602, 200 P.3d at 1151 (holding that an applicant for post-conviction relief cannot challenge the sufficiency of the grounds contained in the state's motion for summary disposition for the first time on appeal). Rather, Barker asserts that, because the district court dismissed on grounds different than those contained in the state's motion, it was required to provide a twenty-day notice before dismissing the claims. The state responds that Barker has failed to show that the district court granted summary dismissal on a basis different than that asserted by the state. We will address each claim in turn.

The state's request for summary dismissal at the end of its answer concludes:

> Summary dismissal of the petition is appropriate as the Court is not required to accept [Barker's] mere conclusory allegations, unsupported by admissible evidence. *Sparks v. State*, 140 Idaho 292, 295, 92 P.3d 542, 545 (Ct. App. 2004), review denied (citing *Roman v. State*, 125 Idaho 644, 647, 873 P.3d 898, 901 (Ct. App. [1994]); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). Furthermore, Idaho Code § 19-4906(b) provides, in pertinent part, as follows:
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> > When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal.

1. Medical expert

Barker's application for post-conviction relief contains a claim of ineffective assistance of counsel based on his attorney's failure to secure a medical expert witness to testify at trial. Specifically, Barker's application alleges, in pertinent part:[2]

> (d) Trial Counsel . . . rendered ineffective [assistance] for failure to bring in an [sic] expert witnesses for the following reasons: 1) a medical Doctor in order to show that it is simply impossible to strike someone with a baseball bat, with full force, without breaking and/or fracturing a leg. [The victim] testified that [Barker] hit her ankles with a baseball bat twice. Remember there were no ex-rays taken of her ankle.

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[2] The second allegation contained in (d) was of ineffective assistance of counsel for failing to secure an expert to examine hair from the victim's head. At a hearing on December 20, 2007, Barker acknowledged that the hair had been released and examined by an expert and that he was "not going to submit any evidence or testimony about that hair." Therefore, only the first part of claim (d) is at issue in this appeal.

In addition to the general language from the state's request for summary dismissal quoted above, the state's answer specifically responded to this allegation with "[a]nswering paragraph 9(d), the state denies the conclusory allegations about trial counsel's trial tactics contained therein." The district court summarily dismissed this claim, concluding that there are "no facts indicating a medical doctor would say 'it is simply impossible to strike someone with a baseball bat, with full force, without breaking and/or fracturing a leg.'"

Thus, in substance, the state's answer and motion asserted that this claim specifically was conclusory and, generally, that all of Barker's claims were conclusory because they were unsupported by admissible evidence. The district court agreed with the state and summarily dismissed this claim because it was unsupported by admissible evidence from a medical doctor.

Additionally, the district court revisited this claim and entered a subsequent order confirming its dismissal in January 2008. The district court initially dismissed this claim in August on two grounds--Barker provided no admissible evidence from a doctor and there was no evidence that the victim was struck with "full force." Barker filed a motion for relief and cited to testimony from the victim that she was struck with full force. At an October hearing, the parties further discussed this claim and the district court acknowledged that, even if the testimony showed the victim was struck with full force, there was no admissible evidence from a doctor. The district court's order from January denied Barker's motion for relief and repeated the court's earlier conclusion that the claim be summarily dismissed for lack of evidentiary support from a doctor. Not only has Barker failed to demonstrate that the district court summarily dismissed his claim of ineffective assistance of counsel for failure to secure a medical expert on a ground different than that asserted by the state, Barker received very explicit notice from the court and an opportunity to respond before this claim was ultimately dismissed.

2. Affidavits at sentencing

Barker's application for post-conviction relief contains a claim of ineffective assistance of counsel based on advice his trial attorney allegedly gave him at sentencing:

> (o) Trial Counsel . . . rendered ineffective [assistance] for instructing [Barker] to keep silent concerning those prejudicial affidavits used in an earlier divorce proceeding, and used by the State in order to enhance [Barker's] opportunity to respond to the allegations contained in those affidavits, (Sentencing Tr., p. 768, Ls. 8-10), and although [Barker] wanted to respond [to] the prejudicial information, he was instructed by counsel not to respond.

In addition to the general language from the state's request for summary dismissal quoted above, the state's answer specifically responded to this allegation with "[a]nswering paragraph 9(o), the state denies the conclusory allegation of ineffective assistance of counsel" in regard to Barker's claim about attorney advice he received during the sentencing hearing. The district court summarily dismissed this claim, holding that Barker "failed to present facts indicating what was false about those affidavits or how he would have responded to them."

The state's answer and motion alleged in a general way that this claim specifically was conclusory and, generally, that all of Barker's claims were conclusory because they were unsupported by admissible evidence. The district court agreed with the state and summarily dismissed this claim because it was unsupported by admissible evidence indicating what was false in the affidavits and how Barker would have responded. Barker has failed to demonstrate that the district court summarily dismissed his claim of ineffective assistance of counsel based on advice Barker's trial attorney allegedly gave him at sentencing on a ground different than that asserted by the state. Furthermore, we do not need to decide whether the notice of grounds for the dismissal offered by the state were sufficient because Barker did not complain of the lack of adequacy of the notice before the trial court.

C. Additional Affidavits

Barker's application contains a claim that his trial attorney was ineffective for failure to have hair from the victim independently tested to determine whether it was pulled out or cut off of the victim's head. After the initial summary dismissal hearing, the district court granted Barker several continuances to have the hair examined by an expert. At the final hearing on the state's motion for summary dismissal, held on December 20, 2007, Barker abandoned this claim. However, at that hearing Barker produced four new affidavits and asked the district court to amend his application to reflect a claim of ineffective assistance of trial counsel for failure to call these witnesses. The district court entertained argument on the effect of those new affidavits and its written order granting the state's motion for summary dismissal indicates that the court considered the four new affidavits as part-and-parcel of Barker's original claim that his trial attorney was ineffective for failure to investigate and prepare for trial--claim 9(a).[3] The district

[3] In substance, the district court treated Barker's additional affidavits and the argument regarding them as a motion for reconsideration of its earlier order summarily dismissing claim

court subsequently issued an order summarily dismissing Barker's remaining post-conviction claims.

On appeal, Barker argues that the district court applied the wrong standard in determining whether he demonstrated prejudice and that he is entitled to an evidentiary hearing on his claims of ineffective assistance of counsel for failure to investigate the witnesses who provided the affidavits in preparation for trial. The state argues that Barker has not made a prima facie showing of deficient performance or prejudice.

Barker's convictions were the result of two separate incidents, one occurring in late April 2004 and one in late July 2004. At trial, the jury was shown multiple photographs of the victim's injuries, which included bruising, ligature marks, a bite mark, and a broken thumb. Barker, his half-brother, and his half-brother's wife all testified at trial about the victim falling out of a van prior to the April incident and about a raft trip the victim had taken prior to the July incident. These witnesses testified or implied that the victim's bruises and injuries could have been caused by the fall from the van or the raft trip. It was undisputed that the victim had fallen out of the van and had gone rafting prior to the incidents in question. Three of the affidavits were intended to support the defense that the victim received the bruises and injuries from her fall out of the van and from the rafting trip. At the December hearing, the state argued that the new affidavits were cumulative of evidence presented at trial and, therefore, Barker could not demonstrate that he was prejudiced by his attorney's failure to call these witnesses. The district court agreed and dismissed this claim because the "affidavits do not establish that the testimony of these witnesses at trial would have made a difference in the outcome. In fact the affidavits appear cumulative of testimony already presented by defense on the issue of how the bruising occurred."

We need not determine if the evidence was merely "cumulative" for we agree with the district court's conclusion regarding the prejudice prong of *Strickland.* The affidavits offer only speculation on how the victim received her injuries. None of the affiants aver that they observed bruises or injuries on the victim after her fall out of the van or after the rafting trip. One of the

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9(a), rather than amending Barker's application to add a new claim. Therefore, we need not address the state's argument that Barker's amendment was barred by the statute of limitation or Barker's responses that the state waived a statute of limitation argument or that the "amendment" relates back.

affidavits contains inadmissible hearsay that speculates the injuries occurred when the victim fell out of the raft. Specifically, that affidavit avers that the affiant was told the victim fell out of the raft. Furthermore, even if some or all of the bruises were attributable to the rafting trip or the fall from the van, that still does not explain the victim's broken thumb, the bite mark, or the ligature marks.

Barker also presented an affidavit from a doctor who averred that he examined photographs of the victim's bruises and the bruises appeared to be several days old, which would be consistent with the victim receiving the injuries earlier than Barker's alleged attacks. The district court noted that the doctor's explanation about the age of the bruising did not address the other injuries--the bite mark, broken thumb, or ligature marks--and that both the victim and the paramedic presented substantial evidence regarding all the injuries. Therefore, the district court dismissed this claim because Barker had not demonstrated that he was prejudiced by his trial attorney's failure to investigate this witness for trial purposes. Again, we agree with the district court's conclusion. Furthermore, we note that the jury saw photographs of the victim's injuries from both attacks. The photographs from the first attack were admittedly taken several days after the attack. The doctor's affidavit did not identify which photographs he was shown. Barker has not demonstrated that the district court erred in dismissing this claim.

Two of the affidavits speculate that the victim invented the story of the abuse to avoid a criminal charge for stealing a raft. The affidavits do not explain how inventing the story of abuse helped the victim avoid a criminal charge and are lacking in any admissible evidence.

The last affidavit was provided by one of Barker's employers who averred that Barker was in McCall painting the employer's house on May 7 and 8. Barker argues that this information is important because it undermines the credibility of the victim and bolsters the version of events he produced at trial. At trial, the victim testified that, after the April incident, she told the police that Barker had abused her. The victim made two subsequent telephone calls to the police in which she left messages changing her story to implicate her ex-husband and a woman from a bar. She explained these subsequent calls at trial by testifying that Barker was present when she made the calls and that he threatened her and intimidated her into exculpating him. Barker's half-brother's wife testified at trial that she was present during one of the calls and that Barker was working at McCall when the phone call was made. Neither the trial evidence nor the post-conviction evidence establishes the dates or times at which those calls were made,

and the district court concluded the "jury could reasonably believe from the evidence that the phone conversation occurred during the first part of May." The district court concluded that the affidavit from the employer did not demonstrate prejudice.

Again, we agree with the district court's conclusion. The affidavit avers that the affiant assumes that Barker stayed the evening of May 7 in McCall and says nothing about when Barker left McCall on May 8. More importantly, neither the trial evidence nor the new affidavits establish the dates when either call was made. Therefore, there is no evidence that the affidavit in any way contradicts the victim's testimony. Furthermore, even if the dates of the recantation calls were established, this additional testimony as contained in the affidavit would only have helped bolster an alibi for Barker for one of the recanting phone calls the victim made to the police.[4]

Barker's final argument is that the district court applied the wrong standard in determining the prejudice prong under *Strickland.* Several places in its order dismissing Barker's application, the district court held that Barker had not demonstrated that the result of his trial would have been different. The district court incorrectly stated the standard, which is whether there is a *reasonable probability* that the result of the trial would have been different. We pause to caution that courts and the parties should always be careful to articulate the proper legal standards. However, we have reviewed Barker's claims on appeal under the correct standard and conclude that the additional affidavits do not undermine confidence in the outcome of the trial. Barker argues that, when determining whether he has demonstrated prejudice, we should look at the cumulative effect of the separate claims related to the four additional affidavits. We have done so. Examining the cumulative effect of the affidavits does not alter our conclusion. The district court did not err in summarily dismissing Barker's claim of ineffective assistance of counsel for failure to call the four individuals who submitted affidavits.

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[4] Claim 9(a) asserts ineffective assistance of counsel for failure to investigate and prepare for trial. Only one of the affidavits contains a statement that the affiant was not contacted by counsel. There is no other evidence in the record to determine if counsel did or did not evaluate investigate or contact any of the other affiants.

IV.

CONCLUSION

Barker's claim regarding the state's answer fails because he was aware that the state was seeking summary dismissal of his application. The district court dismissed Barker's allegations of ineffective assistance of counsel on the same grounds that the state advocated, and the district court properly dismissed Barker's claim of ineffective assistance for failure to call witnesses because Barker failed to demonstrate prejudice. Accordingly, the district court's order summarily dismissing Barker's post-conviction application is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge GRATTON, **CONCUR.**